BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Certification of Northeast Ohio Public Energy Council as Governmental Aggregator	)	Case No. 00-2317-EL-GAG
In the Matter of the Complaint and Request for Emergency Interim Relief by Dynegy Marketing and Trade, LLC Against the Northeast Ohio Public Energy Council	)	Case No. 22-0817-EL-CSS
In the Matter of the Motion of Northeast Ohio Public Energy Council for a Limited Waiver of Rule 4901:1-10-29(H), Ohio Administrative Code	)	Case No. 22-0806-EL-WVR

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MEMORANDUM CONTRA MOTION BY DYNEGY MARKETING AND TRADE, LLC TO CONSOLIDATE CASES FOR PURPOSES OF DISCOVERY AND HEARING

I. INTRODUCTION

In its 2-page Motion to Consolidate Cases for Purposes of Discovery and Hearing (the "Motion"), Dynegy Marketing and Trade, LLC ("Dynegy") seeks to consolidate three "cases":

- NOPEC's Notice of Material Change, filed August 24, 2022 in *In re Certification of Northeast Ohio Public Energy Council as Governmental Aggregator*, 00-2317-EL-GAG, ("Notice of Material Change");
- NOPEC's *In re Motion of Northeast Ohio Public Energy Council for a Limited Waiver of Rule 4901:1-10-29(H)*, 22-0806-EL-WVR ("Waiver Case"); and
- Dynegy's *In re the Complaint and Request for Emergency Interim Relief by Dynegy Marketing and Trade, LLC against Northeast Ohio Public Energy Council*, 22-0817-EL-CSS ("Complaint Case").

The only meaningful connection Dynegy identifies between the Notice of Material Change, the Waiver Case, and its Complaint Case is Dynegy's desire to pursue its own self-interest. Dynegy is attempting to prevent NOPEC's customers from returning to their electric distribution utilities' ("EDU") lower-priced Standard Service Offer ("SSO"), which Dynegy supplies.[1] Dynegy seeks consolidation to tie NOPEC's two cases with the prolonged procedural schedule that will apply to Dynegy's unrelated Complaint Case. Dynegy's motion is a classic abuse of the Public Utilities Commission of Ohio's ("Commission") rules and is made solely for the purpose of delaying NOPEC's customers' right to lower-priced electric service.

This is not a reason to consolidate. The three "cases" are not sufficiently similar – in fact, the Notice of Material Change is not a case, or even a proceeding. Further, consolidation would have two negative impacts. It would allow Dynegy to create procedural hurdles and delay NOPEC's return of customers to SSO service, costing these customers more money.

II. LAW AND ARGUMENT

1. There is no "Notice of Material Change" proceeding to consolidate, Dynegy simply seeks to impose delay.

Dynegy moves to consolidate its Complaint Case with NOPEC's Waiver Case and Notice of Material Change. This is an impossibility because there is no pending proceeding regarding NOPEC's Notice of Material Change.

NOPEC's Notice of Material Change is simply a *notice*. *See* OAC 4901:1-24-11(A). It does not require any determination or ruling from the Commission. This is why NOPEC could have simply taken the action first, and then filed the Notice of Material Change 30 days later. *See id.*

[1] See NOPEC's memorandum contra Dynegy's motion for temporary stay filed with the PUCO contemporaneously with this memorandum contra.

This does not mean the Commission is without authority. If the Commission has concerns whether the changes to NOPEC's business operations affect its ability to provide service, it can open a proceeding to consider NOPEC's ability. *Id.* at (A)(2). The return of customers to the SSO does not affect the ability to provide service, and the Commission has not opened a proceeding to consider that issue.

NOPEC merely has filed a notice of a change in its operations. Even under the broadest reading of "proceeding," a mere notice does not qualify. For example, in *In Re Rev. of Chapters 4901-1, 4901-3, & 4901-9 of Ohio Adm. Code*, 06-685-AU-ORD, 2006 WL 3951746 (Ohio P.U.C. Dec. 6, 2006), the Commission rejected a broad definition of "proceeding" that would have included "any filing, hearing, investigation, inquiry, or rulemaking which the Commission is required or permitted to make, hold, or rule upon." *Id.* at *7. Here, Dynegy tacitly attempts to go even further than this rejected definition and expand the definition to include *any* filing—even one that requires no holding or ruling from the Commission.

Thus, by moving to "consolidate" NOPEC's Notice of Material Change with its Complaint Case, Dynegy does not actually seek to consolidate two proceedings. There are not two proceedings. Instead, Dynegy seeks a roundabout way of imposing delays on NOPEC's announced return of customers to SSO service.

2. Even if consolidation were possible, it is not warranted.

There is no statute or rule dictating the standards applicable to a possible consolidation of proceedings before the Commission. But there is well-established guidance available on this issue—the Commission has looked to the Ohio Civil Rules of Procedure.[2] Specifically, the

[2] *In the Matter of the Application of The Ohio Bell Telephone Company for Authority to Revise its Exchange and Network Services Tariff, PUCO No. 1, to Service Feature*, Case No. 93-343-TP-ATA, 1993 Ohio PUC LEXIS 419, Entry on Rehearing (April 29, 1993); *In the Matter of the Petition of Richard E. West and Numerous Other*

Commission has looked to Ohio Civil Rule 42, which allows a court (or, here, the Commission) to consolidate cases that "involve a common question of law or fact." *Id.* Therefore, guidance from Ohio's courts interpreting Rule 42 is instructive here.

Under this Rule, "before the actions may be properly consolidated, the court must determine if there is enough commonality of issues to warrant consolidation and if the parties are substantially the same." *Waterman v. Kitrick*, 60 Ohio App.3d 7, 14, 572 N.E.2d 250, 256–57 (10th Dist.1990). "In making such a determination, the court should be mindful of the purpose of consolidation, which is the saving of time when a joint trial is used as opposed to separate trials." *Id.; Miller v. Beard*, 73 Ohio Law Abs. 10, 13, 136 N.E.2d 366, 369 (2nd Dist.1955) ("The test as to consolidation of actions is: Does it clearly appear that the parties are the same and the causes of action identical?")

Accordingly, when faced with a motion for consolidation, the Commission should consider three questions:

1. Is there sufficient commonality of issues between the two matters?
2. Are the parties substantially the same?
3. Would consolidation streamline the actions and save time?

Here, the answer to all three questions is no.

a. There is insufficient commonality

First, the issues in the three "cases" are not the same:

- Dynegy's Complaint Case: Dynegy has alleged that NOPEC has violated administrative rules.

Subscribers of the Franklin Exchange of The Ohio Bell Telephone Company, Case No. 91-1811-TP-PEX, 1992 Ohio PUC LEXIS 210, Entry (March 25, 1992).

- NOPEC's Notice of Material Change: This is a ministerial notice from NOPEC that a number of its customers will be moved to SSO service.
- NOPEC's Waiver Case: NOPEC seeks a waiver of a rule that requires electric distribution utilities ("EDUs") to provide two-day notice to customers who return to the SSO.

With respect to NOPEC's Notice of Material Change, as set forth above, it is merely a notice. It does not raise *any* issues for the Commission to decide. Accordingly, it necessarily cannot have issues in common with the Complaint Case or Waiver Case.

Further, the remaining Complaint Case and Waiver Case should not be consolidated. They do not raise the same issues: Would the basis of the consolidated case be whether the EDUs should receive a limited waiver of certain notice requirements, or would it be whether Dynegy has met its burden of proof that NOPEC has violated rules and should lose its certificate to provide service? These are entirely separate questions. The result of one determination in no way dictates the result of the other. In fact, the result of one determination does not impact the other at all.

Accordingly, there is no commonality of issues.

b. The parties are not the same

Second, the parties are not substantially the same. Dynegy is not a party to NOPEC's general decades-old certification case, where the Notice of Material Change was filed, and it cannot be made a party to a ministerial notice filing.[3]

Dynegy is also not a party to NOPEC's Waiver Case, and it should not be. In its Motion to Intervene, Dynegy has not identified a single justification for intervention into the Waiver Case, and instead, conflates the issues in the limited Waiver Case with the issues raised its own

[3] See, also, NOPEC's Memorandum Contra Dynegy's Motion to Intervene, filed concurrently with this memorandum in the certification case.

Complaint. Dynegy has no interest in whether or EDUs receives a limited waiver of certain notice requirements.

c. Consolidation would create harmful delay

Third, and most importantly, consolidation would not save time. It would cost time, and money, to NOPEC's customers who are being returned to SSO service.

As Dynegy makes clear in its Motion, it intends to use consolidation as a vehicle to stay, discover into, and challenge the Notice of Material Change – which, again, is a ministerial filing that is not subject to such litigation. Because Dynegy has no basis to stay or interference with a simple Notice of Material Change (indeed, no one does), it seeks consolidation with its Complaint Case as a backdoor approach. By conflating the Notice of Material Change and its own Complaint case, Dynegy would transform an ordinary Notice of Material Change into a pseudo proceeding—a proceeding that does not raise any issues for adjudication, does not involve any adverse parties, and does not even provide for any Commission ruling—but yet is somehow beholden to the procedural schedule in Dynegy's Complaint Case.

Dynegy's motion to consolidate is a thinly veiled scheme for delay. This is not efficiency; this is weaponized inefficiency. Moreover, the Commission should not permit Dynegy to intervene as a stalking horse in this proceeding for its sister company that competes directly with NOPEC in the retail governmental aggregation space. Dynegy's expedited request for discovery is no more than an attempt to create an avenue for Dynegy to obtain sensitive competitive information about NOPEC and its member communities on its sister company's behalf. There is no public policy reason that favors letting Dynegy make an end run around the Commission's long established Commission procedures and rules, and R.C. Title 49.

III. CONCLUSION

For the reasons set forth above, the Commission should DENY Dynegy's Motion to Consolidate.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra Dynegy's Motion to Accelerate Discovery and Scheduling of Evidentiary Hearing was served upon the persons listed below by electronic transmission this 7th day of September 2022.

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Summary: Text Northeast Ohio Public Energy Council's Memorandum Contra Motion by Dynegy Marketing and Trade, LLC to Consolidate Cases for Purposes of Discovery and Hearing electronically filed by Teresa Orahood on behalf of Dane Stinson